

## **Article 32 Investigations Fact Sheet**

**Purpose.** The Fifth-Amendment constitutional right to grand jury indictment is expressly inapplicable to the Armed Forces. In its absence, Article 32 of the Uniform Code of Military Justice (Section 832 of Title 10, United States Code), requires a thorough and impartial investigation of charges and specifications before they may be referred to a general court-martial (the most serious level of courts-martial). However, the accused may waive the Article 32 investigation requirement. The purpose of this pretrial investigation is to inquire into the truth of the matter set forth in the charges, to consider the form of the charges, and to secure information to determine what disposition should be made of the case in the interest of justice and discipline. The investigation also serves as a means of pretrial discovery for the accused and defense counsel in that copies of the criminal investigation and witness statements are provided and witnesses who testify may be cross-examined.

**Procedures.** An investigation is normally directed when it appears the charges are of such a serious nature that trial by general court-martial may be warranted. The commander directing an investigation under Article 32 details a commissioned officer as investigating officer, who will conduct the investigation and make a report of conclusions and recommendations. This officer is never the accuser. This officer may or may not have any legal training, although the use of military attorneys (judge advocates) is common within Service practice. If the investigating officer is not a lawyer, he or she may seek legal advice from an impartial source, but may not obtain such advice from counsel for any party.

An investigative hearing is scheduled as soon as reasonably possible after the investigating officer's appointment. The hearing is normally attended by the investigating officer, the accused and the defense counsel. In some cases, the commander will also detail counsel to represent the United States, a court reporter and an interpreter. Ordinarily, this investigative hearing is open to the public and the media.

The investigating officer will, generally, review all non-testimonial evidence and then proceed to examination of witnesses. Except for a limited set of rules on privileges, interrogation, and the rape-shield rule, the military rules of evidence (which are similar to the federal rules of evidence) do not apply at this investigative hearing. This does not mean, however, that the investigating officer ignores evidentiary issues. The investigating officer will comment on all evidentiary issues that are critical to a case's disposition. All testimony is taken under oath or affirmation, except that an accused may make an unsworn statement.

The defense is given wide latitude in cross-examining witnesses. If the commander details an attorney to represent the United States, this government representative will normally conduct a direct examination of the government witnesses. This is followed by cross-examination by the defense and examination by the investigating officer upon completion of questioning by both counsel. Likewise, if a defense witness is called, the defense counsel will normally conduct a direct examination followed by a government cross-examination. After redirect examination by the defense counsel, or completion of questioning by both counsel, the investigating officer may conduct additional examination. The exact procedures to be followed in the hearing are not

specified in either the Uniform Code of Military Justice or the Manual for Court-Martial. The investigating officer, however, will generally:

- Announce the beginning of the investigation and its purpose
- Advise the accused of his or her right to counsel and ascertain whether the accused will be represented by counsel, and if so, by whom
- Formally read the charges preferred against the accused
- Advise the accused of his or her rights to make a statement or to remain silent
- Review the documentary or real evidence available against the accused
- Call any available adverse witnesses
- Review documentary or real evidence in favor of the accused
- Call available favorable witnesses for the accused
- Hear any evidence presented by the accused
- Hear any statement the accused or defense counsel may make
- Entertain, if any, arguments by counsel

Upon completion of the hearing, the investigating officer submits a written report of the investigation to the commander who directed the investigation. The report must include:

- Names and organizations or addresses of defense counsel and whether they were present throughout the taking of evidence, or if not, why not
- The substance of any witness testimony taken
- Any other statements, documents, or matters considered by the investigating officer
- A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense, or was not competent to participate in the defense during the investigation, or there is a question of the accused's competency to stand trial
- A statement whether the essential witnesses will be available at the time anticipated for trial or a statement why any essential witness may not then be available
- An explanation of any delays in the investigation
- The investigating officer's conclusion whether the charges and specifications are in proper form
- The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged
- The recommendations of the investigating officer, including disposition of the charges

Upon completion, the report is forwarded to the commander who directed the investigation for a decision on disposition of the offenses.

**Rights Of the Accused.** The accused at an Article 32 investigation has several important rights.

The accused also has a right to waive an Article 32 investigation and such waiver may be made a condition of a plea bargain. If the investigation is not waived, the accused is entitled to be present throughout the investigative hearing (unlike a civilian grand jury proceeding). At the hearing, the accused has the right to be represented by an appointed military defense counsel or may request an individual military defense counsel by name and may hire a civilian attorney at

his or her own expense. Again, unlike a civilian grand jury proceeding, the servicemember, through the member's attorney, has the following rights: to call witnesses; to present evidence; to cross-examine witnesses called during the investigation; to compel the attendance of reasonably available military witnesses; to ask the investigating officer to invite relevant civilian witnesses to provide testimony during the investigation; and, to testify, although he or she cannot be compelled to do so.

The accused must be served with a copy of the investigative report and associated evidence. Within five days of receipt, the accused may submit objections or comments regarding the report to the commander who directed the investigation.

**Comparison to the Civilian Preliminary Hearing and Grand Jury Process.** The Article 32 investigation has often been compared to both the civilian preliminary hearing and the civilian grand jury since it is functionally similar to both. All three of these proceedings are theoretically similar in that each is concerned with determining whether there is sufficient probable cause (reasonable grounds) to believe a crime was committed and whether the person accused of the crime committed it. The Article 32 investigation, however, is broader in scope and more protective of the accused. As such, it is not completely analogous to either proceeding.

A civilian defendant at a preliminary hearing may have the right to counsel, the right to cross-examine witnesses against him or her, and the right to introduce evidence in his or her behalf. An Article 32 investigation is considered broader in scope because it serves as a mechanism for discovery by the defense, and because it supplies the convening authority (the decision authority) with information on which to make a disposition decision. While a decision by a magistrate at a preliminary hearing is generally final, the investigating officer's decision is merely advisory.

Unless waived, a civilian defendant may be prosecuted in a federal court for an offense punishable by death, imprisonment for a term exceeding one year, or imprisonment at hard labor only after indictment by a grand jury. (An indictment is a formal written accusation or charge). This Fifth Amendment constitutional right does not apply to state prosecutions - although some state constitutions and statutes have provisions that are analogous to the Fifth Amendment and require an indictment by a grand jury for a felony or other defined offenses. Accordingly, if a service member is tried in a state court, his or her right to indictment by grand jury is dependent upon the particular state's procedures.

The grand jury is a closed, secret proceeding, in which only the prosecution is represented. The body of jurors decides to indict based upon evidence frequently provided solely by the prosecutor. This may even happen without the accused even having knowledge of the proceeding. Inspection or disclosure of the transcript of the proceeding after indictment is also, generally, severely limited. Obviously, by his absence, a defendant is precluded from the opportunity to confront and cross-examine witnesses, to present evidence, call witnesses in his or her favor, or even to speak for him or herself. If a defendant is called before a grand jury, he or she has no right to have a lawyer present through or at any other part of the proceeding. If a

grand jury does not indict, the decision is generally final and charges against the defendant are usually dismissed.

The Article 32 investigation, in contrast, is generally an open proceeding that may be attended by the public. Unlike a grand jury proceeding, the accused has the right to be present at the investigation; the right to be represented by an attorney; the right to present evidence; the right to review a copy of the investigative report as well as the several other important rights discussed above. Again, the recommendation of the Article 32 investigating officer is not final - it is only advisory.

Beyond Article 32 of the Uniform Code of Military Justice (Section 832 of Title 10, United States Code), additional rules on Article 32 investigations are contained at Rule for Courts-Martial (R.C.M) 405, as supplemented by case law and service regulations.